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No. 99-729

In The

Supreme Court of the United States

CITY OF WEST HAVEN, WEST HAVEN PLANNING AND ZONING COMMISSION, DONALD LEWIS, AND DAVID SALDIBAR,

Petitioners,

v.

GEORGE THOMAS, BARBARA THOMAS, AND JOHN FINNELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Connecticut

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Respondents' Opposition is more significant for what it does not say, than for what it does say. Respondents do not dispute that *each* of the questions presented in the Petition are questions of substantial importance about which federal and state courts are in conflict. Respondents' failure to contest the existence of a conflict on the first question presented involving the scope of the Equal Protection Clause is not surprising in light of the Court's grant of a writ of certiorari on that precise issue in *Village of Willowbrook v. Olech*, 67 U.S.L.W. 3528 (U.S. Sept. 28, 1999) (No. 98-1288). Notably, however, Respondents also do not deny that the Connecticut Supreme Court's decision on the second question presented – whether an allegedly tainted minority of a unanimous zoning board can render a municipality liable under 42 U.S.C. § 1983 – is (along with a similar holding of the Massachusetts Supreme Judicial Court) in direct conflict with decisions of the Sixth, Ninth and Eleventh Circuits. As Respondents concede by their silence, each of those circuit courts have held that to prevail on a § 1983 claim against a municipality, a plaintiff must show bias on the part of a *majority* of board members. *See* Pet. at 13-16. The need to resolve this clear conflict among federal and state courts is of great importance to all municipalities. Respondents do not suggest otherwise.

Instead, Respondents present the Court with a variety of purported procedural concerns in an effort to deflect the Court's attention from the substance of the questions presented. Respondents' claims, which in large measure reduce to a single argument, have no merit. Each of the questions presented was squarely decided by the

court below and is properly reviewable by the Court. Accordingly, Petitioners request that the Court grant the Petition on both of the questions presented or, at a minimum, hold pending the Court's decision in *Village of Willowbrook*.

1. Respondents wrongly assert that the Court lacks jurisdiction over the first question presented because Petitioners' Equal Protection Clause arguments in the Connecticut Supreme Court were not framed in the same fashion as they are advanced in the Petition. However, regardless whether Petitioners themselves raised the first question presented in the state court, it cannot be disputed that the Connecticut Supreme Court did, in fact, consider and decide the issue. That is all that is necessary to provide the Court with jurisdiction over the question presented.

In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991), the Court rejected an argument identical to Respondents' when it held that "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." This same point is made in the cases relied on by Respondents. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997) (the Court will not consider a petitioner's federal claim "unless it was either *addressed by*, or properly presented to, the state court") (emphasis added); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (noting that jurisdictional rule relied on by Respondents applies only to questions not "pressed *or passed upon* in the courts below") (emphasis added). As Justice Harlan noted in an opinion cited by

Respondents, "[w]here the highest state court has actually ruled on a federal question, this Court's concern with the proper raising of the question in the state court disappears." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 334 n.2 (1968) (Harlan, J., dissenting) (citations omitted).

There can be no question that the Connecticut Supreme Court "actually ruled" on the precise issue presented in the first question – namely, that a plaintiff can establish a violation of the federal Equal Protection Clause by showing selective treatment motivated by personal animus alone and not because of plaintiff's membership in a suspect class or exercise of any fundamental constitutional rights. Relying on "recent decisions of the Court of Appeals of the Second Circuit for guidance *on the issues presented in the present case*," Pet. App. at 8 (emphasis added), the court made the following ruling on federal law:

> A violation of equal protection by selective [treatment] arises if: (1) the person, compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on the impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or* malicious or bad faith intent to injure a person.

Id. at 8-9 (citations omitted) (emphasis added). The Connecticut Supreme Court thus expressly adopted the construction of the Equal Protection Clause endorsed by the Second Circuit in *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), and the Seventh Circuit in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995),

one that is directly contrary to the Sixth Circuit's decision in *Futernick v. Sumpter Tp.*, 78 F.3d 1051 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996).

The Connecticut Supreme Court's ruling on the scope of the Equal Protection Clause was not only explicit, it was also essential to the court's consideration of the sufficiency of Respondents' claims. For without that ruling, the court would have had no legal standard against which to measure the validity of Respondents' equal protection claims. In seeking review of the Connecticut Supreme Court's legal ruling on the scope of the federal Equal Protection Clause, Petitioners do no more than ask the Court to "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court." *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Contrary to Respondents' claims, "[p]arties are not confined [in this Court] to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899); *see* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.20, at 137 (7th ed. 1993) [hereinafter Supreme Court Practice]. Rather, parties may enlarge upon questions presented so long as the enlargements are fairly included within the issues considered below. *See Illinois v. Gates*, 462 U.S. 213, 219-220 (1983) (citing *Dewey*, 173 U.S. at 197-98); Supreme Court Practice *supra*, at 137. As the Connecticut Supreme Court and Respondents note, *see* Pet. App. 1-34; Opp. at 4, both parties briefed numerous aspects of the equal protection issues; indeed, by the time the case arrived in that court, Respondents' equal protection claim was the *only* claim remaining in

the case. *See* Pet. App. at 5 n.9. Because the first question presented by Petitioners was fairly included within the issues raised below and was expressly decided by the Connecticut Supreme Court, the Court has jurisdiction to decide the question.

2. Respondents make a second argument regarding the propriety of reviewing the first question presented, but upon examination, it is apparent that their second argument is nothing more than a variant of their first claim and it should be rejected for the same reasons.

Respondents disingenuously claim that the Connecticut Supreme Court never ruled on a federal question but decided only a state-law evidentiary issue. *See* Opp. at 3-7.[1] As the excerpt quoted above shows, however, the Connecticut Supreme Court most certainly did rule directly on the federal legal question of the scope of the Equal Protection Clause before proceeding to assess the sufficiency of Respondent's equal protection claims.

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[1] It is difficult to understand what point Respondents believe they are making with their repeated statement that the Connecticut Supreme Court decided only whether they had made out a *prima facie* case, not whether they had pleaded a proper claim. In Connecticut, like every other jurisdiction, a plaintiff makes out a *prima facie* case by adducing sufficient evidence of each of the elements of his cause of action. In order to make that determination, however, a court first must determine the proper legal elements of the claim. It is the Connecticut Supreme Court's determination of the legal elements of a federal equal protection claim and the legal requirements for imposing § 1983 liability on a municipality, *see infra* at 6-8, that are the bases of the Petition. Whether the court decided those federal questions on a motion to dismiss or on a motion for directed verdict is irrelevant.

Indeed, the Connecticut Supreme Court ruled on the identical issue set forth in the first question presented in the Petition.

To be sure, the court then went on to discuss whether Respondents' evidence of malice and selective treatment was sufficient to submit the case to a jury. But Petitioners have not asked this Court to decide whether Respondents' evidence was sufficient to prove personal animus or selective treatment. Instead, Petitioners have asked the Court to review the Connecticut Supreme Court's predicate legal ruling that the protections of the Equal Protection Clause extend to individuals who are selectively treated solely because of the personal animus of a local or state official, regardless whether the plaintiff is a member of a suspect class or was exercising any fundamental constitutional rights. *See* Pet. at i. It is only by ignoring both the question presented in the Petition and the Connecticut Supreme Court's legal ruling on that federal issue that Respondents can possibly make this meritless argument. The Court should reject it.

3. Finally, without disputing the importance of the second question presented regarding municipal liability under § 1983 or the existence of a conflict among lower courts on that issue, Respondents deny that the Connecticut Supreme Court ever ruled on that question. Claiming that all that court decided was a state-law question regarding the proof necessary to make out a *prima facie* case, *see* Opp. at 12-13, Respondents once again ignore both the question presented and the Connecticut Supreme Court's ruling regarding the scope of municipal liability under § 1983.

In fact, the parties joined issue on precisely this question before the Connecticut Supreme Court. In earlier proceedings, the trial court had specifically held that Respondents' evidence consisted solely of improper motive on the part of the individual Petitioners Saldibar and Lewis, and that Respondents had "failed to produce evidence from the [other] commissioners that the actions of Lewis and Saldibar affected their decision." Pet. App. at 56 n.9. Drawing on that finding and this Court's decision in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the municipal Petitioners argued that

> [a] finding that two Planning and Zoning Commissioners individually held malice against the plaintiffs in no way amounts to official policy under the line of Supreme Court rulings. . . . The *Prapotnick* [sic] constitutional analysis requiring proof of policy or custom becomes more obvious when examined from the view that the two commissioners took no part in the final vote. The City and Commission, therefore, cannot be said to have adopted a policy of unequal protection of plaintiffs' rights."

Defs. City's & Commission's Br. at 7, *Thomas v. City of West Haven*, 249 Conn. 385, 734 A.2d 535 (1999) (S.C. 15843) (citations omitted). In reply, Respondents argued that "[b]ecause Plaintiffs proved a prima facie case that Saldibar and Lewis intentionally acted maliciously and thereby caused the denial of their equal protection rights, they have also established a case of municipal liability." Pls.' Reply Br. at 11-12. The parties thus presented the Connecticut Supreme Court with the second question set forth in the Petition.

The court decided that question as well. For in order to determine whether Respondents had made out a *prima facie* case against the City, the court necessarily decided that evidence of malice on the part of only two commission members, each of whom had recused themselves, was sufficient to give rise to municipal liability under § 1983. Moreover, the court reached that decision in the absence of any evidence of any impermissible motive on the part of the other members of the commission or that they had in any way delegated their policymaking authority to Petitioners Saldibar and Lewis. *See* Pet. App. at 34.[2] By reversing the trial court's judgment for the City, the Connecticut Supreme Court answered that question in the affirmative. The court thus entered the longstanding and widespread conflict among federal and state appellate courts regarding the scope of municipal liability under § 1983 for the actions of individual commission members over whom municipalities have no effective control. *See* Pet. at 12-17.

Respondents' focus on the Connecticut Supreme Court's application of this Court's holdings in *McMillian v. Monroe County*, 520 U.S. 781 (1997), and *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), misses the

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[2] Respondents suggest that the decisions in the zoning appeals determined, as a matter of collateral estoppel law, that the *entire* commission acted illegally for purposes of § 1983. *See* Opp. at 16. Respondents neglect to say, however, that they made that identical argument to both the trial court and the Connecticut Supreme Court, and neither accepted it. The zoning decisions are not even referred to in the Connecticut Supreme Court's discussion of municipal liability under § 1983. *See* Pet. App. at 28-34.

point of the second question presented. At no point in these proceedings have Petitioners contested that, under Connecticut law, the zoning commission acts as a final policymaker for the purpose of zoning decisions in the City of West Haven. Nor do they dispute this Court's holding that the intentional deprivation of a plaintiff's civil rights by a final policymaker establishes municipal culpability under § 1983.

What Petitioners do dispute, did contest below, and now ask this Court to review is the Connecticut Supreme Court's determination that a plaintiff may impose liability on a municipality under § 1983 merely by proving impermissible motive on the part of a minority of the members of a final policymaking body – members who, without doubt, are not themselves final policymakers under state law. As the Ninth and Eleventh Circuits both recognize, such a holding runs counter to this Court's rejection of *respondeat superior* as a basis for municipal liability in *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). *See Church v. City of Huntsville*, 30 F.3d 1332, 1342-44 (11th Cir. 1994); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994); *see also* Pet. at 26-29. This case presents an ideal vehicle for resolving that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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